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No. 82-1002

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In The

Supreme Court of the United States

October Term, 1982

CARNATION COMPANY,

Petitioner,

STATE DIVISION OF HUMAN RIGHTS, on the complaint of DARYL CLARKE,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, Fourth Judicial Department

REPLY TO BRIEFS FOR RESPONDENTS DARYL CLARKE AND THE STATE DIVISION OF HUMAN RIGHTS

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QUESTION PRESENTED

1. Does this Court have jurisdiction pursuant to 28 U.S.C. §1257(3) to hear the issues raised in Carnation's petition where the issues have been raised explicitly and implicitly at every stage of the proceedings below?

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REPLY TO BRIEFS FOR RESPONDENTS DARYL CLARKE AND THE STATE DIVISION OF HUMAN RIGHTS

STATEMENT OF THE CASE

Carnation Company [hereinafter "Carnation"] disagrees with the Statement of the Case as set forth in the Brief for Respondent Daryl Clarke [hereinafter "Clarke"] and in the Brief for Respondent New York State Division of Human Rights [hereinafter "NYSDHR"] in opposition to Carnation's petition for a writ of certiorari. In particular, Carnation disagrees with Clarke's characterization of Carnation's extensive efforts to accommodate him in the practice of his religion. Carnation also disagrees with the NYSDHR's statement that it failed to submit cost data in support of its position that accommodating Clarke in the manner he requested would

have resulted in increased costs. (NYSDHR's Brief at 2). Therefore, Carnation respectfully requests that this Court rely on the relevant facts as set forth in Carnation's petition.

POINT I

This Court has jurisdiction to hear the issues raised in Carnation's petition for certiorari.

Carnation's first argument in the petition for certiorari is that *Trans World Airlines, Inc. v. Hardison,* 432 U.S. 63 (1977) [hereinafter *"Hardison"*] laid down the principle that requiring more than "reasonable accommodation" of a particular employee's religious beliefs discriminates against the religious convictions of other employees which creates an establishment of religion contrary to the First Amendment of the United States Constitution. Carnation has consistently raised this argument in the state forums below and, therefore, the issue is properly before this Court.

Carnation's brief before the NYSDHR stated that *"Hardison* is totally dispositive of the issues herein." (Carnation's NYSDHR Brief at 12). Among other things, it quoted the holding in *Hardison* that requiring an employer to give a complainant Saturdays off where no volunteer could be found to work for him:

> [W]ould deprive another of his shift preference at least in part because he did not adhere to a religion that observed the Saturday Sabbath. (Carnation's NYSDHR Brief at 26).

Elsewhere Carnation's brief specifically points out that Section 296.10 of the New York Executive Law:

> Cannot be construed to require an employer to discriminate against some employees in order to enable others to observe their sabbath. *Hardison, supra,* at p. 81. (Carnation's NYSDHR Brief at 29).

Moreover the NYSDHR read *Hardison* and, thus, knew that the concept of reasonable accommodation was adopted to avoid the establishment problem. Nevertheless the NYSDHR specifically refused to apply *Hardison*. (See Appendix C to Carnation's Petition at 53).

Carnation then appealed to the State Human Rights Appeal Board [hereinafter "Appeal Board"]. Point VI of Carnation's brief is devoted entirely to the establishment argument. After discussing *Hardison*, the brief presents the three prong test laid down in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The point concludes by stating:

> To go beyond [the *Hardison*] test is to invite the unconstitutionality of the statute by imposing the heavier obligations which would be repugnant to the concepts of establishment of religion and excessive religious entanglement. (Carnation's Appeal Board Brief at 62).

The highest state court from which Carnation could obtain review was the New York Supreme Court, Appellate Division, Fourth Department. The Appellate Division was thoroughly familiar with the argument that failure to follow the reasonableness rule laid down in *Hardison* might cause the state statute to violate the establishment clause of the First Amendment since it questioned Clarke's counsel on this point when the case was first before it. *State Division of Human Rights v. Carnation Co.*, 53 A.D.2d 1053, 385 N.Y.S.2d 888 (4th Dep't. 1976), *reversed on other grounds*, 42 N.Y.2d 873, 397 N.Y.S.2d 781, 366 N.E.2d 869 (1977). As Clarke states in an earlier brief to the New York Court of Appeals:

> During oral argument the bench asked counsel for the Complainant and Respondent whether *Parker Seal Co. v. Cummins* . . . then pending before the United States Supreme Court, was dispositive of the issues raised by Complainant. That case was before the Court basically on the First Amendment issue of establishment of religion. (Clarke's Court of Appeals' Brief at 34).

In the present appeal, the Appellate Division again had notice of the establishment issue because Carnation's briefs to the NYSDHR and the Appeal Board were part of the record furnished to it by the NYSDHR. Even though the Appellate Division was fully aware of the establishment argument, Carnation, after citing *Hardison*, repeated its argument that to accept Clarke's interpretation of the statute would require:

> Carnation to discriminate against its other employees. If Carnation were to require other employees to work on Saturdays in Complainant's place . . . it would be guilty of discrimination against its other employees and would be in violation of its collective bargaining agreement. (Carnation's Appellate Division Brief at 26).

This is the essence of the establishment argument in *Hardison* and the basis of the petition to this Court, that is, requiring more than reasonable accommodation involves religious discrimination against other employees which is establishment of religion.

Thus it is abundantly clear that the issue of accommodation to the point of discriminating against other employees or establishing particular religious views has been explicitly raised at each stage of the state litigation. However, there is no requirement that an issue be explicitly raised in the state forum for this Court to obtain jurisdiction. As was stated in *Bryant v. Zimmerman*, 278 U.S. 63 (1928) [hereinafter *"Bryant"*]:

> No particular form of words or phrases is essential, but only the claim of invalidity and the ground thereof be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that it was done, the claim is regarded as having been adequately raised. *Id.* at 67.

In *Bryant*, the realtor did not mention any specific constitutional provision or constitution. Nevertheless, the issue was preserved because, among other things, it was clear that the state's highest court cited authorities which dealt with the constitutional question.

Presbyterian Church v. Hull Church, 393 U.S. 448 (1969) [hereinafter *"Presbyterian"*] presented an even vaguer claim of unconstitutionality. Two local churches sued a church organization to enjoin it from trespassing on their property. In its answer, the church organization stated that the suit violated the "laws . . . of the *United States of America.*" *Id.* at 444, n.3. (Emphasis in the original). On appeal, the church argued that the dispute involved church doctrine and to submit such an issue to a civil court would "destroy the doctrine of separation of church and state". *Id.* Although no mention was made of the establishment clause or the First Amendment, this Court stated: "Petitioners thus clearly raised claims under the First Amendment. . . ." *Id.*

Recently, in *Beck v. Alabama*, 447 U.S. 625 (1980) [hereinafter *"Beck"*], the appellant mentioned that a statute violated several federal constitutional provisions in his petition to the state court but never argued them in his brief, nor did the court decide the case on federal constitutional grounds. In asserting jurisdiction, this Court stated that "[i]t is clear that petitioner did present his federal claims *in some fashion* to the Alabama Supreme Court." *Id.* at 631. (Emphasis added).

Carnation's efforts to raise the establishment issue far surpass those accepted as sufficient in *Bryant, Presbyterian* and *Beck*. The issue was explicitly raised in all forums. Moreover, in the Appellate Division it was raised in numerous ways both expressly and by clear intendment. First, the Appellate Division acknowledged in the first appeal its acute awareness of the "First Amendment issue of establishment of religion". Clarke's Court of Appeals' Brief at 34. Second, in keeping with *Bryant*, the record before the Appellate Division contained the lower tribunal briefs on the establishment issue. Third, following *Bryant*, the authorities cited by Carnation in its brief to the Appellate Division raised the establishment argument. In particular, *Hardison*, which raised the rule of reasonable accommodation to avoid an establishment problem, was cited to the court. Fourth, the principle of *Hardison* was explicitly reiterated to the Appellate Division. In *Presbyterian*, the estab-

lishment issue was raised without naming either the First Amendment or the federal constitution. Mentioning the doctrine of separation of church and state was enough. Carnation's statement that it should not have to discriminate against the religious views of others is an even clearer expression of the concept that one employee's religious views should not be established over those of others. This is especially true where, as here, the Appellate Division was fully cognizant of this argument from a prior appeal, the record, and the cases cited to it, including *Hardison* which held that such discrimination or establishment was to be avoided.

Moreover, it is important to note that the constitutional issue need not be raised at all where the state court "renders an unexpected interpretation of state law" or reverses its prior interpretation. *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 86 n.9 (1980) [hereinafter *"Pruneyard"*]. Here the Appellate Division suddenly and unexpectedly rejected all prior New York case law which held that the statute could only require reasonable accommodation. Since the Appellate Division "rendered an unexpected interpretation of state law", Carnation was under no obligation to raise the establishment issue and, therefore, under *Pruneyard*, this Court clearly has jurisdiction. *Id.*

In New York, the NYSDHR is given a strong voice in setting state policy in the area of discrimination. *State Office of Drug Abuse Services v. State Human Rights Appeal Board*, 48 N.Y.2d 276 (1979). Moreover, the Appeal Board sits as a state appellate forum. As the United States Supreme Court has stated: "a State may enunciate policy through an administrative agency, as well as through its courts, and so long as there is an opportunity for judicial review the fact that such review may be denied on the discretionary basis does not make the agency's action any less the voice of the state for purposes of this Court's jurisdiction. . . ." *Pacific Telephone & Telegraph Co. v. Public Utilities Commission of Cal.*, 443 U.S. 1301, 1304 (1979). Since the establishment issue was an issue before the NYSDHR and the Appeal Board which set the policy in this

area, the courts of the State of New York have clearly had an opportunity to pass on the issue.

Nor is there any question that the issue of whether the state is preempted by federal labor law from compelling an employer to accommodate an employee in the observance of his sabbath in a manner which is inconsistent with a valid collective bargaining agreement has been raised at every stage of these proceedings. Carnation briefed and argued this issue to the Appellate Division when this case was first before it. *State Division of Human Rights v. Carnation Co., supra.* Indeed, Clarke devotes six pages of his brief to rebut Carnation's argument that "accommodating Complainant will cause [it] to discriminate against its other employees". Clarke's Appellate Division Brief at 24. The NYSDHR argued that the weight of federal case law under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et seq.* had rejected Carnation's argument. Affidavit of Alan J. Saks, Esq., sworn to February 23, 1976, in support of the NYSDHR's Answer to Carnation's Petition for Review, pars. 7-9.

The federal labor law issue was also briefed and argued by Carnation before the New York Court of Appeals when this case was first before it. *State Division of Human Rights v. Carnation Co.*, 42 N.Y.2d 873 N.Y.S.2d 781, 366 N.E.2d 869 (1977). As Carnation asserted "to accede to Complainant's demand . . . would require the Employer to discriminate against its other employees . . . [and] it would be in violation of the Collective Bargaining agreement . . . *Dewey v. Reynolds Metals Co., supra*". Carnation's Court of Appeals' Brief at 16. Moreover, Clarke also briefed and argued this issue. Clarke's Court of Appeals' Brief at 47, n.15. The NYSDHR explicitly raised the issue and discussed it in its brief. NYSDHR's Court of Appeals' Brief at 25. After this Court's decision in *Hardison,* Carnation raised and extensively briefed the issue on its motion for reargument before the New York Court of Appeals, which motion was denied. *State Division of Human Rights v. Carnation Co.*, 51 N.Y.2d 771 (1980).

At the public hearing before the NYSDHR, counsel for Carnation again raised the issue that accommodating Clarke to the disadvantage of the other employees would violate the collective bargaining agreement. Transcript, February 15, 1978, Vol. 1, p. 24. Following the hearing, Carnation briefed the issue as did Clarke. Carnation's NYSDHR Brief at 24-27.

Even more extensively, Carnation argued and briefed the issue that the employer's obligation to accommodate does not take precedence over the collective bargaining rights of other employees on the authority of this Court's decision in *Hardison* to the Appeal Board. Carnation's Appeal Board Brief at 27-31.

Finally, the issue was briefed and argued before the Appellate Division. More specifically, Carnation argued that the provisions of the collective bargaining agreement in regard to rotation of relief days apply equally to all employees and do not discriminate against any of them. "The agreement, in fact, provides a fair and equitable method of distributing the work load among the employees without discrimination against any of them. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977); *Dewey v. Reynolds Metals Company*, 429 F.2d 324 (6th Cir. 1970), *aff'd by an equally divided Court*, 402 U.S. 689 (1971)." Carnation's Appellate Division Brief at 26. Accordingly, it cannot be said that the New York courts did not have notice of the federal labor law issue before it and under the holdings in *Bryant*, *Presbyterian*, and *Beck*, discussed above, there can be no doubt that this Court has jurisdiction to review this issue.

Finally, the due process issue has been raised in regard to the lack of substantial evidence to support the decision of the NYSDHR. More particularly, the issue was implicitly raised in Carnation's brief to the Appellate Division. Carnation's Appellate Division Brief at 19, and explicitly raised at pages 13-15 of Carnation's motion to the Appellate Division for leave to appeal to the Court of Appeals. Further, the issue was raised by Carnation in its brief in support of its motion to the Court of Appeals for leave to appeal. As Carnation stated: "[t]he decision below has deprived Carnation of due process of law

and rendered this statute [N.Y. Exec. Law §296.10] unconstitutional as applied." Carnation's Court of Appeals' Brief at 22. Accordingly, this Court has jurisdiction to consider this issue.

POINT II

Section 5601(b)(1) of New York's Civil Practice Law and Rules does not apply to this case.

The NYSDHR argues in its brief that this Court lacks jurisdiction by reason of the fact that Carnation "failed to invoke N.Y. Civ. Prac. Law §5601(b)(1)" and, therefore, has failed to "exhaust all of the possibilities afforded by state procedures for review". NYSDHR's Brief at 5-6. This argument is totally without merit.

Section 5601(b)(1) provides that "an appeal *may* be taken to the court of appeals as of right "where there is *directly* involved the construction of the constitution of the State or of the United States". If, however, the decision was or may have been based upon some other ground, permission to appeal must be sought pursuant to Section 5602. See *Winters v. Lavine*, 574 F.2d 46 (2d Cir. 1975). In *People ex rel. Ryan v. Lynch*, 262 N.Y. 1, 186 N.E. 28 (1933) the court granted a motion to dismiss an appeal as of right on the ground that the construction of the United States Constitution was not directly involved. Appellant was contesting the Tax Commissioner's interpretation of the word "resident" in Section 350 of the Tax Law which interpretation subjected him to substantial tax liability. In dismissing the appeal, the court stated:

> In a certain sense every question as to the enforcement of a statute involves its constitutionality, but we have repeatedly held that this is not enough. An appeal upon the ground asserted here must present to us directly and primarily an issue determinable only by our construction of the Constitution. The decision below was not necessarily based directly on constitutional grounds. Although it appears on the record that the Federal question was presented below (citation omitted), that is not conclusive on our right to review. *Id.* at 4.

In the instant case, the Appellate Division unanimously affirmed the Decision and Order of the Commissioner on the ground that the Decision and Order appealed from was supported by substantial evidence. Since the appellate court's decision "was not necessarily based directly on constitutional grounds", an appeal as of right did not lie. 262 N.Y. at 4. Accordingly, Carnation sought leave to appeal to the court of appeals by permission, which leave was denied. *State Division of Human Rights v. Carnation Co.*, 57 N.Y.2d 606 (1982). Thus Carnation has met the highest state court requirement and jurisdiction is proper.

CONCLUSION

For all of the foregoing reasons, it is respectfully requested that Carnation's petition for a writ of certiorari should be granted.

Respectfully submitted,

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